Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of: National Exchange Carrier Association, Inc.	)	CC Docket No. 93-123
Revisions to Tariff FCC No. 5	)	
Universal Service Fund and Lifeline Assistance Rates	)	

COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association (USTA) respectfully submits these Comments on the Direct Case filed on May 26, 1993, by the National Exchange Carrier Association, Inc. (NECA), in this proceeding. NECA's Direct Case responded to the Common Carrier Bureau Order Designating Issues for Investigation, released April 23, 1993 (Order). The Bureau has indicated it is conducting the investigation as a non-restricted notice and comment proceeding. Order at ¶¶ 7,9.

I. NECA HAS SHOWN THAT ITS PROCEDURES FOR RESIZING OF THE UNIVERSAL SERVICE FUND (USF) ARE REASONABLE, AND THAT THE RATES IT FILED IN TRANSMITTALS 518 AND 527 FULLY COMPORT WITH COMMISSION REQUIREMENTS AND DO NOT INFLATE THE USF REVENUE REQUIREMENT.

NECA filed its Direct Case and answered the Bureau's directive that it respond to the items set out in the Order. NECA demonstrated in its Direct Case that the methodology it uses to resize the Universal Service Fund (USF) is reasonable and is done in accordance with Commission rules. NECA also showed that the USF rate employed in the two Transmittals 518 and 527 does not unreasonably inflate the USF revenue requirement.

NECA points to Commission orders that provided guidelines for the resizing of the USF to assure that there would be an acceptable match of qualifying exchange carrier costs with USF revenue. The Bureau notes that the Commission did not codify the specific procedure used by NECA in its resizing (Order at note 5), but the Order accepts the fundamental validity of resizing the USF. Indeed, NECA's Direct Case points to a Commission statement that specifically provides that "NECA should be able to adjust the charges to the ICs to reflect any updates in the USF costs filed by carriers..." MTS-WATS Market Structure, 3 FCC Rcd 5518, 5529 (1988). The Commission's prior directives to NECA regarding handling of the USF, along with the specific requirements of its Part 36 rules, fully respond to the Bureau's own concern, set out in the Order, that USF revisions have resulted in NECA not correcting the National Average Unseparated Loop Cost per Working Loop so as to change payouts for companies other than the company making updates. Order at ¶ 2. The Order raises a policy concern that has been previously asked and answered, by the Commission's own rules.

NECA's Direct Case shows that its particular procedure for resizing is a fair and reasonable implementation of the plain wording of the Commission's Part 36 rules, specifically sections 36.612 and 36.622 of those rules. NECA's use of the formula in section 36.622 for identifying the National Average Unseparated Loop Cost per Working Loop shows that it uses the new nationwide average to determine the additional interstate expense allocation for companies that make update filings, and does not use the new average to affect the amount of the additional interstate expense allocation for companies that did not make an update filing. NECA shows that the Commission's rules prohibit it from doing what the Order suggests. NECA Direct Case at 7, 10 and 11.

The purposes of these rules are straightforward - to maintain a stable USF and to assure that network investment in high cost USF areas would not be stifled to the detriment of customers that live there, by limiting the amount available to make investments in USF-qualifying areas.

A policy that uses new averages to change the USF allocation to those companies who do not make updates could undermine the purposes for which the USF exists. It would inject unnecessary risk and instability into the USF processes for USF-eligible carriers. Worse, it would operate in derogation of one of the Communications Act's (Act) core public policies in the common carrier area, threatening the quality of basic facilities and services in USF-eligible areas.

NECA notes in its Direct Case that limiting the effects of quarterly updates to the filing carriers maintains stability for other USF carriers. NECA Direct Case at 12.

USTA agrees. The Commission has recognized the serious continuing challenges to the maintenance of universal service that are present in an increasingly competitive communications environment.

NECA shows in its Direct Case that it reviews the various update filings for accuracy and completeness, and that it makes adjustments to accommodate the periodic shortfalls and surpluses that can occur, as well as to implement data corrections that are significant. NECA Direct Case at 9-11, notes 17 and 19. Indeed.

II. THE COMMISSION SHOULD NOT MAKE RETROACTIVE ANY DECISION THAT MAY MANDATE CHANGE IN NECA'S RESIZING PROCEDURES, TO ANY DEGREE.

The Commission staff inquires whether any Bureau requirement that NECA revise its USF resizing procedures should be applied retroactively, and if so, how far back. Order, Issue B. The Bureau should not require NECA to make any retroactive adjustments. Such adjustments could be beyond the Bureau's authority and would be inconsistent with fundamental Commission policy and orders. Retroactivity is not favored in the law; thus, administrative rules are not to be construed to be retroactive unless their language requires this effect. Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). The matters at issue here do not require or merit any retroactive change. Even if it were lawful to mandate a new and retroactive, it would not be good policy to do so. The balancing of interests here shows that the ill effects of application retroactively of a new resizing requirement would far outweigh the need, and that the overall hardship on NECA and on USF carriers and their customers would far outweigh any public ends to be accomplished. See Iowa Power and Light v. Burlington Northern, 647 F.2d 796 (8 Cir. 1981); Tennessee Gas Pipeline Co. v. FERC, 606 F.2d 1094 (D.C.Cir. 1979).

The structure of the Act suggests strongly that retroactive change in USF resizing procedures is not permissible if it will lead to changes regarding tariff transmittals that have already been allowed to take effect without suspension and an accounting order. Section 204 of the Act does not allow the Commission to force refunds or retroactive rate adjustments, unless the Commission has taken the necessary preliminary statutory steps. See, e.g., Illinois Bell Telephone Company v. FCC, No. 89-1365, decided June 16, 1992, pet. for rehearing denied, November 2, 1992. The Commission has had a particularly thorough involvement in the development of the rules and procedures governing the USF, and has exerted close supervision each year over the nature of NECA's tariff filings related to the USF. As the Order acknowledges, the Commission has just completed an eight year funding transition within the USF and also allowed other parts of the Transmittals at issue to become effective here. Order at note 1.

In the context of these Transmittals, the Bureau is further limited by the requirement that it, too, must comply with the Commission's rules and cannot act in an arbitrary and capricious way. The Commission is bound by its own requirements and conditions no less than those whom it regulates. It is basic due process that the government cannot set up regulations and then disregard or ignore them. Brown v. U.S., 377 F.Supp. 530 (D.D.C.Tex. 1974). See also Montilla v. I.N.S., 926 F.2d 162 (2d Cir. 1991).

Having provided a framework for NECA to develop the USF and to carry out the fundamental and express policy of maintaining universal service through the implementation and administration of the USF, the Bureau cannot now take action that is at odds with the Part 36 provisions governing NECA's resizing activities. The

Commission (not the Bureau) may elect to initiate action to reevaluate the Commission-established requirements and procedural rules, assuming it can now articulate a new and defensible basis for such action, while still assuring that universal service will remain available throughout the nation and that the deployment of new technologies and services in USF-eligible areas will not be adversely affected.

Separate from the legal limitations, NECA's Direct Case outlines why the impact of any retroactive application would be adverse to the public interest. As stated above, the ill effects of application retroactively of a new resizing requirement would far outweigh the need. The overall hardship on NECA, on USF carriers and on their customers would outweigh any public ends to be accomplished.

The amount at issue in NECA's Direct Case appears to be $14.3 million. NECA Direct Case at 18. There could be a significant related adjustment of costs and accounting records for NECA and affected carriers, that would have further ramifications in the intrastate arena in the absence of cost recovery from the USF. Rates that have become effective in the intrastate jurisdiction that were proposed on the basis of prevailing USF procedures and assumptions. These intrastate rate realities are not capable of being altered now. See NECA Direct Case at 12 (USF revenue requirement amounts already have been removed from the carriers' state revenue requirements.)

Further, the established financial projections and construction budget assumptions of individual companies could be altered to the ultimate detriment of their customers. Resizing changes would lead to peripheral changes in tariffs and contracts. Administrative burdens and costs would be likely to consume any net cost reduction. In contrast, any reduction in USF levels due to resizing would allow interexchange carriers to gain a windfall, generated at the expense of customers in USF-eligible areas.

III. CONCLUSION.

NECA's Direct Case shows that its procedures are reasonable and conform to the Commission's requirements. Indeed, any other procedures would arguably be in violation of Part 36 and the Commission's requirements. If there is a change in the resizing procedures that is newly required as a result of Commission or Bureau action here, any new requirements must remain consistent with the Act's fundamental universal service and new technology deployment policies, and should be prospective only as of the time APA requirements are fully complied with.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on June 23, 1993 copies of the Comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

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